Quarterly Report

OF THE

ATTORNEY GENERAL

OF

ALABAMA

FOR THE PERIOD

FROM OCTOBER 1, 1978
THROUGH JANUARY 15, 1979

WILLIAM J. BAXLEY, Attorney General

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QUARTERLY REPORT

of the

ATTORNEY GENERAL

of

ALABAMA

For the Period

From October 1, 1978

Through January 15, 1979

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from October 1, 1978 through January 15, 1979, is published in compliance with the provisions of Title 55, Section 228 Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State, and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy district attorney of his county. The section also requires that I send a copy of this report to each district attorney and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, County, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

WILLIAM J. BAXLEY

Attorney General

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October 4, 1978

W. McLean Pitts, Esquire
City Attorney
Suite 201
City National Bank Building
Selma, Alabama 36701

Housing Authority—Offices and Officers—Competitive Bidding.

City Councilman may submit bid and be awarded contract by Housing Authority without violating **Code of Alabama 1975,** Section 11-43-12 or Section 41-16-60.

Opinion by Assistant Attorney General Knight.

Dear Mr. Pitts:

The Attorney General received your request for an opinion from this office concerning the Selma Housing Authority of the City of Selma.

You asked the following questions:

1. Would a City Councilman by submitting bids to the Selma Housing Authority for motor vehicles or equipment, and if the successful bidder, selling to the Selma Housing Authority, be in violation of Section 11-43-12 of the 1975 Alabama Code?

2. Would a City Councilman by submitting bids to the Selma Housing Authority for motor vehicles or equipment, and if the successful bidder, selling to the Selma Housing Authority, be in violation of Section 41-16-60 of the 1975 Alabama Code.

Regarding your first question, as you stated in your letter the Selma Housing Authority was established under **Code of Alabama 1975,** Title 24, Chapter 1, Article 2. The Supreme Court ruled in **State ex rel Carter v. Harris,** 273 Ala. 374, 141 So. 2d 175, that a housing authority created pursuant to this chapter is a public body and body corporate and politic. In **Knight v. West Alabama Environmental Improvement Authority,** 287 Ala. 15, 246 So. 2d 903, the Supreme Court ruled that public corporation is a separate entity from the State and from any local political subdivision including the city or county. The Court concluded in **City of Mobile v. Cochran,** 276 Ala. 530, 165 So. 2d 81 that the Board of Water and Sewer Commission of the City of Mobile was a separate and distinct corporation from the City of Mobile. Therefore, it can be concluded in accordance with the above court rulings that the Selma Housing Authority is a separate and distinct entity from the city of Selma.

Furthermore, **Code of Alabama 1975,** Section 24-1-24 provides that the members of the housing authority are appointed by the mayor. There is little or no contact between the city council and the housing authority.

Therefore, considering the above discussion it is the opinion of the Attorney General that it would not be a violation of **Code of Alabama 1975,** Section 11-43-12 for a councilman to submit bids to the housing authority to sell the authority equipment and if he is the successful bidder, the authority may buy the equipment from him without violating the section. Section 11-43-12 prohibits a employee or officer of a municipality from having a direct or indirect interest in any contract, work, or business, the price or cost of which is paid from the city treasury.

Turning to your second question, **Code of Alabama 1975,** Section 41-16-60 concerns public contracts and states:

> No member or officer of . . . the county commissions and the governing bodies of the municipalities of the state and the governing boards of instrumentalities of counties and municipalities, including waterwork boards, sewer boards, gas boards and other like utility boards and commissions, shall be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of or contract for any personal property or contractual service, nor shall any person willfully make any purchase or award any contract in violation of the provisions of this article.

It was determined in **City of Montgomery v. Brendle Fire Equipment, Inc.** 291 Ala. 216, 279 So. 2d 480 that the above law is intended to prohibit successful bidding by a member of a governing board of a instrumentality of a municipality and by a business entity in which he has an interest, if such member will have a direct or indirect financial or beneficial interest in the award contract **where such member will be involved in the decision making procedure as to who will be awarded the contract.** In the situation at hand the councilman will have no voice in the awarding of the contract by the Housing Authority. Therefore, it would not be a violation of Section 41-16-60 for the councilman to submit a bid or to sell equipment to the Housing Authority.

If our office can be of further assistance, please do not hesitate to contact us.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

October 5, 1978

Edward B. McDermott, Esquire
301 Saint Joseph Street
Mobile, Alabama 36601

Judges—Conflict of Interest—Officers and Offices

Law partner of municipal judge may be candidate for city council. Municipal judge would be eligible for reappointment if partner is elected.

Opinion by Assistant Attorney General Knight.

Dear Judge McDermott:

The Attorney General received your request for an opinion from this office as to the following matter:

> My law partner, Thomas A. Deas, has qualified for a place on the City Council of the newly mandated mayor-council form of government in Mobile.
>
> My questions are (1) is Mr. Deas eligible to be a candidate for a City Council position in view of the fact I hold office as a municipal judge and (2) if Mr. Deas is elected would that render me ineligible to serve as judge and (3) if I would be eligible to serve as judge, would I be eligible for reappointment in December of 1979 while Mr. Deas is a member of the council?

It is the opinion of the Attorney General that it will not be a violation of any law for your law partner to be a candidate or be elected to the city council and that you may continue to hold your position as municipal judge. However, your law partner cannot represent clients in municipal court and you cannot preside over cases in which your partner is a party or has a direct interest as this would present a conflict of interest and would be against public policy.

It is also the opinion of the Attorney General that you will be eligible for reappointment as the municipal judge although your law partner is elected to the council.

There may be a conflict with the State Ethics Law and I suggest that you notify the State Ethics Commission of these circumstances.

If our office can be of further assistance, please do not hesitate to contact us.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

October 27, 1978

Dr. Walker B. Sorrell
Montgomery County Coroner
Pathology Laboratory
2015 Normandie Drive
Montgomery, AL 36111

Coroners —

Coroner has no authority to take possession of any physical evidence found at the scene of a death other than the body of the deceased.

Opinion by Assistant Attorney General Curtis.

Dear Dr. Sorrell:

This is in reply to your letter of October 2, 1978 in which you request an opinion as follows:

> "This letter is a formal request to you as the Attorney General of Alabama from me, as the Coroner of Montgomery County, for a definition and/or interpretation of the Constitution, Laws, Statutes of the State of Alabama relative to the duties and responsibilities of the Coroner of Montgomery County in gathering of evidence in order to determine the cause of death in such instances when there are reasonable grounds to suspect that unlawful activity by another person or persons has resulted in this death. This of course is the primary function of the Coroner. This request is in addition to the clearly stated statutes giving the Coroner the authority to perform an autopsy or request that an autopsy be performed by another person to determine the cause of death in such instances. I am concerned with the extension of this responsibility to such things as physical evidence other than the body that may be associated with the death being investigated such as knives, bullets, and/or other instruments used in the unlawful activity producing death. I am also concerned with my respective responsibility in taking possession of such evidence and how this evidence is to be handled. I am concerned as to in what circumstances physically that I may take charge of evidence, if necessary, such as the street, a home, a hospital, or other places where a body is found in which there are reasonable grounds to believe that death has resulted from unlawful activity.
>
> "I am further requesting that if possible, that you deliniate the respective responsibilities and duties of the Coroner as relative to the Sheriff and his agents of Montgomery County, the State Highway Patrol Director in Montgomery County and his agents, and the Montgomery City Police Department personnel and/or their agents."

The **Code of Alabama 1975**, § 15-4-1, provides:

> "(a) When a coroner has been informed that a person has been killed or suddenly died under such circumstances as to afford a reasonable ground for belief that such death has been occasioned by the act of another by unlawful means, he must forthwith make inquiry of the facts and circumstances of such death by taking the sworn statement in writing of the witnesses having personal knowledge thereof and submit the same to a judge of a court of record or a district attorney."

The **Code of Alabama 1975**, § 15-4-2, further provides:

> "(a) When a coroner has been informed that a person is dead in the county and that such person died without being attended or examined by a legally qualified physician, the coroner shall forthwith proceed to the place where the dead person is lying, examine the dead body to ascertain the cause of death and report same in the same manner as inquests are reported."

It is my opinion that the duties of the Coroner do not extend to the gathering of physical evidence other than the body of the deceased. The Coroners responsibility is to examine the body of the deceased and to take statements from individuals having personal knowledge of the incidents surrounding the death of the deceased.

The gathering of physical evidence other than the body of the deceased would be the responsibility of the law enforcement agency in whose jurisdiction the death occurs. The Coroner would have no authority to take charge of any physical evidence other than the body of the deceased.

If this office can be of assistance in the future, please do not hesitate to contact us.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

November 2, 1978

Mr. Joe M. Williams
Member—Board of Adjustment
P.O. Box 1223
Tuscaloosa, Alabama 35401

Municipalities—City Councils

Notice of special meetings of city council must be given to the public.

Opinion by Assistant Attorney General Knight.

Dear Mr. Williams:

The Attorney General received your request for an opinion concerning meetings, other than the regular designated meetings, of the City Council of Northport.

You specifically inquired about the type of notice to the public, if any, which must be given in order that these meetings be public and open.

The law of this State which prohibits secret or executive meetings of certain boards, among them being a municipal council, is found at **Code of Alabama 1975**, Section 13-5-1.

This office has ruled that this law applies to all formal and informal meetings of a public body. Opinion to Russell Yarbrough, dated July 7, 1976. Furthermore, **Code of Alabama 1975**, Section 11-43-49 concerning meetings of a municipal council states:

> The council shall determine the time and place of holding its meetings, **which at all times shall be open to the public.**

Concerning the calling of special council meetings, **Code of Alabama 1975**, Section 11-43-50 states:

> There shall be at least two regular meetings of the council in each month, and the presiding officer shall call special meetings whenever in his opinion the public interest may require it and whenever two aldermen or the mayor request him in writing to call such meeting. Upon the failure or refusal of the presiding officer to call such meeting when requested, the two aldermen or the mayor making the request shall have the right to call such meeting.

This section indicates that the calling of special meetings of the council is to be exception rather than done with regularity. The calling of the special meetings must be done within the guidelines set out in this section.

As to the notice which must be given to the public concerning special meetings, the courts have said that the public must be given adequate notice of the time and place of the meeting. No notice is required to be given to the public for regularly scheduled meetings of a public body if the dates, times and locations of such meetings are open to reasonable inquiry. No notice is required in a situation which demands **immediate emergency** action. **Sullivan v. Credit River Township,** 299 Minn. 170, 217 N.W. 2d 502; **Leak v. High Point City Council,** 25 N.C. App. 394, 213 S.E. 2d 386.

Thus, adequate notice of all special meetings of the city council must be given to the public unless immediate emergency action is required of the council.

If our office can be of further assistance, please do not hesitate to contact us.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

November 6, 1978

Honorable J. A. Poe
Mayor, City of Cordova
115 Jasper Street
Cordova, Alabama 35550

Municipalities—City Councils

Member can not be counted present and his vote can not be counted in order to constitute a quorum by use of a speakerphone.

Opinion by Assistant Attorney General Knight.

Dear Mayor Poe:

The Attorney General received your request for an opinion from this office as to whether a mayor or alderman could be counted present and if his vote could be counted by the use of a speakerphone (telephone) in order to have a quorum at a meeting.

Your question is to be answered in the negative.

The Supreme Court ruled in **Penton v. Brown-Crummer Inc. Co.,** 222 Ala. 155, 131 So. 14 that in order to have a quorum the required number of members must be actually present at the meeting and the requisite number cannot be made up by telephoning absent members and obtaining their vote by telephone. It is the opinion of this office that this holding of the Court would still rule although a speakerphone would be used and all of the members present could hear the absent member's vote and where there could be a discussion between the absent member and those present. Therefore, an absent member could not be counted present and his vote could not be counted in order to constitute a quorum by use of a speakerphone.

If our office can be of further assistance, please do not hesitate to contact us.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

November 9, 1978

Honorable Joe L. Payne
Attorney for the City Board of
Education of Huntsville, Alabama
c/o Ford, Caldwell, Ford & Payne
Post Office Box 527
Huntsville, Alabama 35804

Board of Education—Constitutionality—Schools

1. Classroom distribution of Gideon Bibles is unconstitutional.

2. Central distribution of religious literature, including Gideon Bibles, is permissible.

3. The City Board of Education of Huntsville should implement guidelines for the central distribution of religious literature in its schools prior to distribution of Gideon Bibles or any other religious literature.

Opinion by Assistant Attorney General Petree

Dear Mr. Payne:

This is in response to your letter requesting an Attorney General's opinion on the following question:

> "May the City Board of Education of Huntsville, Alabama, permit the Gideon Society to distribute partial Bibles in schools under the control of the City Board of Education of Huntsville?"

At the time you requested this opinion it appeared that the Fifth Circuit's opinion in **Meltzer v. Board of Public Instruction,** 548 F.2d 559 (5th Cir. 1977) controlled this jurisdiction to prohibit any distribution of Gideon Bibles in public schools on the grounds that such distribution is a violation of the First Amendment of the United States Constitution. However, the Fifth Circuit granted a rehearing in **Meltzer** and on July 31, 1978, the Court, en banc, reversed part of its earlier decision to allow a more flexible approach to this issue.[1]

Although the rehearing opinion also held unconstitutional the procedure of allowing classroom distribution of Gideon Bibles, the Court in essence approved employment of school board guidelines for distribution of Gideon Bibles **along with** other religious literature in a central designated place in the school. Accordingly, it is the opinion of this office that the Huntsville City Board of Education may not allow classroom distribution of Gideon Bibles. Still, Gideon Bibles may be made available to the city schools for distribution in a manner similar to the procedure outlined in **Meltzer,** 548 F.2d at 562, note 3.

If I may be of further assistance please let me know.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

[1]**Meltzer,** No. 75-1423 slip op. at 5801 (5th Cir., July 31, 1978)

November 14, 1977

F. D. Gray, Esq.
Gray, Seay & Langford
P. O. Box 239
Tuskegee, Alabama 36083

Recorder's Court—Attorneys—Conflicts of Interest

The newly effective Code of Alabama 1975 changes the law with respect to municipal court prosecutors and now such prosecutors may represent criminal defendants in other courts.

Opinion by Assistant Attorney General Stephens.

Dear Mr. Gray:

In accordance with your request we have reconsidered the opinion which we issued on May 17, 1977 to Mr. Aubrey Ford, Jr. of your firm which stated that Title 13, Section 243(1), Code of Alabama 1940, Recompiled 1958, prohibited a municipal court prosecutor from representing criminal defendants in other courts in this state. Upon review of that opinion, I still believe it to be a correct statement of the law as it then existed. However, since the issuance of that opinion the newly enacted Code of Alabama 1975 has become effective and that Code substantially changes the law with respect to municipal prosecutors.

Title 13, Section 243(1), Code of Alabama 1940, Recompiled 1958 provided:

> "§243(1). **Representing defendants charged with criminal offenses.—Any deputy solicitor, county solicitor, or solicitor of a law and equity court or inferior court,** who acts as attorney for, represents, or defends any defendant charged with a criminal offense of any kind or character in any court, state, county, municipal or federal, in this state shall be guilty of a misdemeanor and upon conviction must be fined not less than one hundred dollars nor more than one thousand dollars."

The corresponding section of the newly effective Code of Alabama 1975 is Section 12-17-195 and, by contrast, it provides:

"§12-17-195. **Assistant district attorneys representing defendants charged with criminal offenses.—Any assistant district attorney** who acts as attorney for, represents or defends any defendant charged with a criminal offense of any kind or character in any court, state, municipal or federal, in this state, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than $100.00 nor more than $1,000.00"

It can readily be seen that the new Code deletes any reference to municipal court prosecutors and confines its application to assistant district attorneys. The new Code became effective October 31, 1977 and, therefore, this previous provision of law no longer prohibits a municipal prosecutor from representing criminal defendants in other courts in this state. Of course, there may be particular cases in which a prosecutor has a conflict of interest and the prosecutor should consult the Code of Professional Responsibility and other state conflicts of interest laws for their application to particular cases.

Sincerely,

WILLIAM J. BAXLEY
Attorney General

November 17, 1978

Honorable Larry D. Bennett
Commissioner
Board of Corrections
101 So. Union Street
Montgomery, Alabama 36130

Probation

Under Act 754, Acts 1976, Page 1038, approved August 26, 1976, trial judge may confine convicted defendant not exceeding one year and grant probation for remainder of sentence in respect to each charge or indictment upon which defendant was convicted.

Opinion by Assistant Attorney General Sykes.

Dear Mr. Bennett:

I have the following inquiry from your predecessor as follows:

"Request your office render an opinion on the proper interpretation of Act 754, Regular Session 1976 concerning alternative sentencing procedure.

Section 1. of the above Act states in part "When a defendant is convicted of an offense and receives a sentence of ten years or less, in any court having jurisdiction to try offenses against the State of Alabama, and the judge presiding over the case is satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, he may order that the convicted defendant be confined in a prison, jail-type institution, or treatment institution for a period not exceeding one year and that the executive of the remainder of the sentence be suspended and the defendant be placed on probation for such period and upon such terms as the court deems best."

Up until now, so much of the above as states "He may order that the convicted defendant be confined in a prison, jail-type institution or treatment institution for a period not exceeding one year" has been interpreted to mean that the total incarceration under Act 754 could not exceed one year. In recent cases, the Judge has ordered that an individual be incarcerated for a total of two years (twelve months on each two cases). In discussing this sentencing with the Judge, he stated that it was his interpretation that the one year incarceration could be applied in more than one case making the above sentence proper under Act 754.

Specifically request that your office render an opinion as to whether the "not exceeding one year" confinement should be applied to the total sentence under Act 754, or

Should the "not exceeding one year" confinement be considered to apply to each case under which an individual is sentenced under Act 754 even though the total incarceration resulting from such sentence will exceed one year."

In my opinion the trial court may treat each indictment or charge separately and impose a sentence of confinement not exceeding one year in each case, the remainder of each sentence to be suspended and defendant to be placed on probation for such term as the court may decide.

The statute quoted in your inquiry is operative "when a defendant is convicted of an offense and receives a sentence of ten years or less". This refers to one case, one indictment, or one charge.

In respect to that one charge, the court is authorized to sentence the defendant for one year maximum and grant probation in connection with the remainder of the sentence.

If defendant is charged and convicted for two offenses, the statute applies separately as to each offense. In the second conviction, in my opinion, the court may impose another sentence not to exceed one year

and grant probation for the remainder of the 2nd sentence.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

November 30, 1978

Honorable William J. Benton
District Attorney
26th Judicial Circuit
P. O. Box 939
Phenix City, Alabama 36867

Banks—Banking—Worthless Check Act

Banks may not assess a service charge of more than $2.00 for returning a dishonored check.

Opinion by Assistant Attorney General Stephens

Dear Mr. Benton:

I have received from you your letter containing the following statement of facts and request:

> "This office has received complaints concerning the practice of certain banks in charging more than the two dollar amount authorized by Section 13-4-120, Code of Alabama, 1975, for dishonoring checks.
>
> "Section 13-4-120 is couched in language that appears permissive, rather than directory, and a question remains whether that section or another provision of law restricts or limits such charges to the amount set forth therein.
>
> "We would be grateful for a formal opinion from your office as to whether such practice as outlined above contravenes the law, and, if so whether any penalty attaches for violation."

It is my opinion that the practice described in your letter does contravene state law. **Code of Alabama 1975,** Section 13-4-120 provides:

> "§13-4-120. **Service charges.** Any depository dishonoring a check for reasons outlined in sections 13-4-113 through 13-4-117 and the "person," as defined in section 13-4-111, to whose account the check was deposited and to whom it is returned may assess the person who drew the check a service charge of $2.00."

It is my opinion that this section of law prescribes the maximum service charge which may be assessed for returning a dishonored check. A

bank may not wish to assess a $2.00 service charge but the bank may not assess a service charge of more than $2.00. Unless the Legislature had intended to limit the amount of the permissible service charge there would have been no reason for providing a specific amount for the service charge. The Legislature could have merely stated that banks could assess a service charge for returning dishonored checks without specifying the amount of that charge. By specifying the amount of the permissible service charge in the law itself the Legislature has limited the permissible amount of such a service charge.

The penalties provided in **Code of Alabama 1975,** Section 13-4-122 appear to apply only to those persons who have fraudulently issued worthless checks and not to persons who may have assessed excessive service charges for return of dishonored checks. No specific penalty is provided for assessing an excessive service charge. Of course, a court in a civil action might enjoin a bank from charging the excessive charge and might require repayment of the excessive charge to those persons by whom it has been paid.

I hope and trust that this sufficiently answers your question.

Sincerely,

WILLIAM J. BAXLEY
Attorney General

November 30, 1978

Mr. E. C. Wilson
Superintendent of Education
Etowah County Board of Education
Gadsden, AL 35901

Schools—County Boards of Education

Vacancy in office discussed.

Opinion by Assistant Attorney General Hamlett.

Dear Mr. Wilson:

I have your letter in which you request an opinion from this office concerning a situation in which a person elected to membership on the county board of education chose not to serve in such capacity and failed to "qualify" for the office once elected.

As you know, the organizational meeting of the county boards of education is required by law to take place on the third Tuesday of November of each year. Section 16-8-4, **Code of Alabama 1975.** This is generally the first official meeting of each county board after the

general election in which county board members are elected. It is at this meeting that these newly elected members "qualify" by taking and subscribing to the prescribed oath of office. In your situation, a person elected in this year's general election decided not to take the oath of office. Therefore he is not a member of the board.

Also, this situation raises two questions: (1) Whether the outgoing board member whose seat on the board was to be filled by the person who declined to take office continues to serve on the board and if so for how long? (2) Has a vacancy occurred on the board and if so how shall that vacancy be filled?

With regard to the first question above, Section 16-8-2, **Code of Alabama** 1975 provides that the outgoing board member continues to serve until his successor has been elected and qualified. Here, while the successor was elected, he failed to "qualify" for the office as prescribed by this section. Therefore the outgoing board member continues to serve. Under cases decided by the Supreme Court of Alabama he may continue such service for such reasonable length of time as may be necessary for a successor to be elected and qualified.

In response to your second question, it is the opinion of this office that a "vacancy" has occurred on the county board of education. Authorities are numerous which hold that a "vacancy in office" occurs when a person elected to the office fails to "qualify" for the office. Therefore, the filling of the vacancy is governed by Section 16-8-6, **Code of Alabama** 1975. That section provides a pertinent part that:

> "In the event that a vacancy occurs in the office of the county board of education, the vacancy shall be filled by appointment by a majority of the **remaining members** of the county board of education. . . ." (Emphasis added)

The key terms in this section are "vacancy" and "the remaining members." The term "vacancy" presupposes that there exists a seat on the county board of education which is unoccupied. Thus, by using the term "remaining members" it clearly and affirmatively appears that the legislature intended to exclude from participation in the appointment process the person in whose seat the "vacancy" occurs. That person cannot be one of the "remaining members." And, while it is true that under the present situation the outgoing board member does continue to serve on the board, that service, under this statute, does not include the selection of his successor in office. To hold otherwise would cause the terms of this statute to be contradictory.

This opinion does not consider any implications that the Alabama Ethics Law might have in this situation.

Sincerely,

WILLIAM J. BAXLEY
Attorney General

December 12, 1978

Honorable Tom Purvis
Sheriff, Mobile County
Post Office Box 113
Mobile, Alabama 36601
Mobile County

Constitutionality of local Act Setting Punishment for Motorcross Racing

Opinion by Assistant Attorney General Greenhaw.

Dear Sheriff Purvis:

This office is in receipt of your letter of September 21, 1978, wherein you requested an opinion concerning the constitutionality of a local act making motorcross racing in Mobile County within one-half mile of any occupied dwelling without the written consent of the occupant of such dwelling a misdemeanor. You particularly expressed concern as to whether the act violated Article 4, §§104 and 105 of the Constitution of Alabama.

Section 104(14), **Constitution,** prohibits the Legislature from passing a local law fixing the punishment of a crime.

As the act makes motorcross racing as described a misdemeanor and by reference to Act 607, Regular Session 1977, sets punishment, it is my opinion that the act is in violation of §104(14), **Constitution,** and therefore unconstitutional. See **Thompson v. State** 274 Ala. 383, 149 So 2d 916; **State v. Rogers,** 281 Ala. 27. 198 So. 2d 610. Because the act is unconstitutional under this section, we do not find it necessary to address the other questions you have raised about the act.

If you have any questions concerning this matter, please do not hesitate to contact me.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

January 10, 1979

Honorable Inge Johnson
P. O. Box 191
Tuscumbia, Alabama 35674

Vacating of office by incumbent Circuit Judge occurring after General Election for such office but prior to qualification by person elected in such election does not defeat results of the General Election.

Opinion by Assistant Attorney General Hamlett.

Dear Mr. Johnson:

We have your letter of December 8, 1979 in which you request an opinion of this office regarding whether a vacancy in the office of Circuit Judge created by the resignation of the incumbent Circuit Judge after the 1978 November General Election in which a successor to the incumbent was elected but prior to the time such successor was to be sworn in defeats the results of the General Election in which the successor was elected to a full six year term as Circuit Judge. In your letter you state that you were elected in the November General Election to a full six year term as Circuit Judge to succeed the Honorable James E. Smith III.

Subsequent to your election but prior to January 15, 1979, the date set by law for you to take office, Judge Smith resigned from his position. Governor Wallace has appointed you to serve in Judge Smith's position until January 15, 1979, the date set for the expiration of Judge Smith's term.

Your specific question is whether by taking the oath of office for the unexpired term you forfeit your rights to the six year term to which you were elected.

It is the opinion of this office that by being sworn in as Circuit Judge to fulfill the unexpired term of Judge Smith, you do not forfeit your rights to the full six year term to which you were elected to succeed him. While Section 6.14, Amendment No. 328, Constitution of Alabama, 1901 specifies that a vacancy in all judicial offices shall be filled by appointment and the term for which such appointee may serve, it is our opinion that that section was not intended to allow a vacancy in a judicial office to defeat the results of a General Election occurring prior to such vacancy. In this regard Section 6.14 of Amendment 328, supra, must be read with Section 6.13 of that Amendment. Section 6.13, supra, provides that

"All judges shall be elected by vote of the electors. . . ."

It is our opinion that once a judge is elected under the provisions of this section, such election may not be defeated by the operation of Section 6.14, supra. See **McDonnell v. State Ex Rel Jones**, 199 Ala. 240, 24 So. 349 (1917).

I trust that we have answered your question sufficiently and if we can be of further assistance, you will feel free to call upon us.

Sincerely,

WILLIAM J. BAXLEY
Attorney General

INFORMAL OPINIONS

During the period October 1, 1978 through January 12, 1979, the Attorney General rendered the following informal opinions.

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ABANDONED LANDS (MINES) PROGRAM			
Implementation of Abandoned Lands Program—Surface Mining Reclamation Commission	Virgil Willett	Dec. 16	SMRC
ABANDONMENT OF HOMESTEAD			
Temporary absence of taxpayer does not result in abandonment of homestead exemption—Ad Valorem—Homestead Exemption—Abandonment of Homestead—Question of Intent	Ken Malone	Oct. 18	367
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Elections—Absentee Voting	E. D. Kennedy	Oct. 18	312
AD VALOREM			
Ad Valorem—Tax Assessor	Sara R. McMullen	Oct. 5	356
Tax Collector cannot collect Ad Valorem taxes until receipt of Tax Assessor's Abstract—Ad Valorem—Tax Aessessor—Tax Collector	Ralph D. Brown	Oct. 2	366
Civitan Club not exempt from Ad Valorem Tax—Ad Valorem Taxes—Exemptions—Counties	Dorothy Miller	Nov. 30	420

Subject	Addressee	Date	File
Temporary absence of taxpayer does not result in abandonment of homestead exemption— Ad Valorem—Homestead Exemption— Abandonment of Homestead—Question of Intent	Ken Malone	Oct. 18	367
Ad Valorem Tax—Kinder-Care Exempt	Marvin Driver	Jan. 12	391
Tax Assessors—Exemption from Ad Valorem Taxation of Real and personal property used for schools	Wayland Cooley	Jan. 9	392
Lessee for 99 years is owner of property for Ad Valorem purposes—Tax Assessor	Ina H. Becker	Dec. 21	292
Tax Assessor—Fees	John Kennard	Jan. 11	326
ADVERTISING			
Chiropractic Examiners—Advertising	Raymond E. Lindsey	Dec. 22	291
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Obtain written consent forms before reviewing client files—Aging Consortium	Brenda Kirk	Jan. 10	91
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Teacher's personal leave—Education—Tenure Commission	Paul R. Hubbert	Nov. 1	Tenure Comm.

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Appeal cannot be dismissed on motion of defendant in trial de novo—Appeals—District Courts	Dwight Duke	Oct. 18	373
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Coroner cannot remove any evidence other than body—Coroners—Autopsies	Walker B. Sorrell	Oct. 17	402
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Motion to change banks may be brought up in each council meeting—Municipalities—Funds—Banking	Jody Jobson	Nov. 17	417
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BONDS			
Education—Bonds—Health	S. Richardson Hill, Jr. Tom Ventress Board of Trustees of University of Alabama	Jan. 11	396
BUILDING COMMISSION			
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CHIROPRACTIC EXAMINERS			
Chiropractic Examiners—Advertising	Raymond E. Lindsey	Dec. 22	291
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Vacating of office by incumbent Circuit Judge—Elections—Circuit Judges	Inge Johnson	Jan. 10	423
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Negotiation within 10% of base bid authorized—Education— Contracts—Competitive Bid Law	William W. Carpenter	Oct. 16	374
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Public Library Service cannot utilize Birmingham Public Library Service—Contracts	Anthony W. Miele	Jan. 5	Public Library Service
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Contracts—Education—Competitive Bid Law	G. L. Farmer	Nov. 9	380
Contracts—Payment for Services—C.P.A.	Jack E. Worthington	Nov. 9	Medical Services Adm.
Public Library Service cannot utilize Birmingham Public Library Service—Contracts	Anthony W. Miele	Jan. 5	Public Library Service
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Coroner cannot remove any evidence other than body—Coroners—Autopsies	Walker B. Sorrell	Oct. 27	402
Autopsy examinations—Death by natural causes—Death by another	Wayne D. Thorn	Oct. 5	Funeral Board
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Civitan Club not exempt from Ad Valorem Tax—Ad Valorem Taxes—Exemptions—Counties	Dorothy Miller	Nov. 30	421
County may appropriate funds to firefighting agency—Counties—Firefighters—Funds	John Armstrong	Oct. 24	414
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Commissioner responsible for public road work in his district—County Commissioner—Public Roads—Counties	George Allen Desmond	Oct. 20	403
Sheriff's expenses paid for attending official function—Sheriffs—Counties—Expenses	John L. Aldridge	Dec. 18	411
Counties—Personnel Board	Mylan R. Engel	Jan. 22	390
Deferred Compensation Program—Retirement—Counties	Guy M. Tate, Jr.	Jan. 6, 1977	398
Records—Tax Assessor—Counties	Bill G. King	Jan. 11	399
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Chambers County—Superintendent of Education	Jerry Milner	Oct. 18	339
Counties—Contract	John Hollis Jackson, Jr.	Nov. 21	333
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Competitive Bid Law—Contracts	Julian D. Butler	Nov. 2	26
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County continue to pay funds to Assistant District Attorney—District Attorney—Salaries	Fred L. Huggins	Oct. 17	144
Dual Officeholding—Municipal Courts—District Attorneys	Hugh H. Williamson	Nov. 21	273
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Appeal cannot be dismissed on motion of defendant in trial de novo—Appeals—District Courts	Dwight Duke	Oct. 18	373

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Motion to change banks may be brought up in each council meeting—Municipalities—Funds—Banking	Jody Jobson	Nov. 17	417
Council member must be present for vote to be counted—Municipalities—City Council	J. A. Poe	Nov. 6	410
National Guard canteens exempt from tax on gas—National Guard—Taxes—Municipalities	Paul S. Conger, Jr.	Jan. 3	405
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